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No. 03-575

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANK M. PATTI, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In opposing certiorari, respondent acknowledges the profound circuit conflict on an issue at the core of our independent judiciary: whether an unconditional guilty plea waives the right to appeal a district court's denial of a recusal motion pursuant to 28 U.S.C. § 455(a). Br. in Opp. 6-7. Nonetheless, respondent contends that the acknowledged conflict "does not warrant this Court's review" because the extraordinary writ of mandamus purportedly suffices as an "adequate remedy," leaving "no need for this Court to resolve the differences in the approaches to that issue taken by the courts of appeals." *Id.* at 6, 8. Respondent's arguments focus not on whether certiorari is warranted, but instead on why a criminal defendant's challenge to the impartiality of a jurist should not be reviewable at all. The undisputed circuit conflict on this issue is ripe for review and should be resolved by the Court now.

Further, respondent also defends the failure of the court of appeals to determine whether petitioner's sentence would have been the same in the absence of one of the three grounds for an obstruction of justice sentencing enhancement found by the district court by claiming it did not violate this Court's holding in *Williams v. United States*, 503 U.S. 193 (1992). Br. in Opp. 11-14. In doing so, respondent has either misconstrued or simply ignored petitioner's argument. The district court's finding of "multiple acts of obstruction" (Pet. App. 44a) was the linchpin of the entire sentencing decision, including the rejection of an adjustment for acceptance of responsibility and a downward departure on multiple grounds (*id.* at 43a-44a), which clearly affected the determination of petitioner's sentencing range. Pursuant to *Williams*, the court of appeals was required to determine whether petitioner's sentence would have been the same if based upon only two of the three obstruction grounds. Its failure to do so warrants review by this Court.

A. This Court Should Grant Certiorari To Resolve the Mature and Undisputed Circuit Conflict Over Whether An Unconditional Guilty Plea Waives the Right To Appellate Review of the Denial of a Recusal Motion Pursuant to 28 U.S.C. § 455(a)

1. Respondent does not contest the statistic that nearly 97 percent of criminal defendants plead guilty or that trial rates continue to decline. *See* United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2001), Table 10, Figure C. Nor does respondent dispute that the courts of appeals are in irreconcilable conflict over the question of whether an unconditional guilty plea waives the right to challenge on appeal a district court's denial of a recusal motion pursuant to 28 U.S.C. § 455(a). Br. in Opp. 6-7. Respondent fails to identify any legitimate reason why this is not an appropriate case by which to resolve the conflict definitively.

Instead, citing *Shearer v. United States*, 528 U.S. 827 (1999), respondent claims that this Court "has denied certiorari previously in a case involving this same issue" and that "[t]here are no new circumstances warranting a different result here." Br. in Opp. 6. The petition for writ of certiorari filed in *Shearer*, however, arose out of an unpublished opinion of the court of appeals. *See United States v. Shearer*, 167 F.3d 538 (5th Cir. 1998) (table). More important, in opposing certiorari, the government highlighted the fact that the petitioner had pleaded guilty and subsequently *did not challenge any aspects of the presentence report*. *See* Brief for the United States in Opposition in *Shearer v. United States* (No. 98-9096) at 3. The court of appeals' decision in *Shearer* did not warrant review by this Court in light of petitioner's failure to object to the presentence report.

In this case, by contrast, petitioner objected to numerous findings in the presentence report, and the sentencing proceedings were hotly contested. Pet. App. 32a-45a. On appeal, petitioner contended that, *inter alia*, the district court erred in (1) calculating the base offense level; (2) refusing to grant an adjustment for acceptance of responsibility; and (3) denying a downward departure on a number of grounds, including

cooperation with law enforcement authorities. Indeed, one of the challenged findings, holding that petitioner had obstructed justice by mounting a media campaign, independently warrants review here. *See* Part B, *infra*.

In addition, since this Court denied certiorari in *Shearer*, there had been two developments. First, the Eleventh Circuit in this case has weighed in on the division of opinion, thus enlarging the split among the circuits. Second, one of the cases involved in the conflict, *United States v. Gipson*, 835 F.2d 1323, 1324-25 (10th Cir.), *cert. denied*, 486 U.S. 1044 (1988), has been called into question by a later decision (which respondent ignores) where the Tenth Circuit *permitted* review of a disqualification denial after the defendant entered into a plea agreement that was conditioned upon other issues. *See United States v. Greenspan*, 26 F.3d 1001, 1005-07 (10th Cir. 1994). These authorities also demonstrate that the question presented is one that frequently recurs in criminal cases.

Moreover, recent legislation, when coupled with Justice Department directives, makes it critically important to review this issue now. Requirements of the PROTECT Act purportedly seek to ensure fairness in the sentencing process for the government as well as the defendant. *See* PROTECT Act, Pub. L. 108-21, Tit. IV, § 401(d), (h), 117 Stat. 670-72 (Apr. 30, 2003). The Attorney General's memorandum to federal prosecutors entitled "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" (Sept. 22, 2003), recognizes that:

> *Just as the sentence a defendant receives should not depend on which particular judge presides over the case*, so too the charges the defendant faces should not depend on the particular prosecutor assigned to handle the cases (emphasis added).

It is simply incongruous for respondent to argue for a measure of fairness to the government, but to object to the critical means of fairness – the appearance of an impartial jurist – for the criminal defendant.

2. Respondent flatly misstates the record in maintaining that "petitioner did not argue below that he was only

seeking recusal for the purpose of sentencing (and not for withdrawal of the plea)." Br. in Opp. 10. To the contrary, petitioner made clear below that he was only seeking resentencing before a different judge. *See* Appellant's C.A. Br. 18; Appellant's C.A. Reply Br. 1. Thus, this Court's guilty plea jurisprudence does not support a finding that a plea waives the right to challenge a recusal motion. *See Brady v. United States*, 397 U.S. 742, 750 (1972); *McMann v. Richardson*, 397 U.S. 759, 770 (1970); *Parker v. North Carolina*, 397 U.S. 790, 794-99 (1970).[1]

3. Respondent's central argument is that "[t]he conflict does not warrant this Court's resolution" because "[t]he rule adopted by the court of appeals in this case does not create insuperable barriers to appellate review for persons in the same position as petitioner." Br. in Opp. at 7. Respondent contends that because criminal defendants have an "adequate remedy" to challenge the denial of a recusal motion – by seeking a writ of mandamus – "there is no need for this Court to resolve the differences in the approaches to that issue taken by the courts of appeals." *Id.* at 8.

Respondent's argument both exhibits a fundamental misunderstanding of the nature of mandamus review and requires this Court to abandon its longstanding policy against piecemeal review of criminal cases. As this Court has noted, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Will v. United States*, 389 U.S. 90, 95 (1967). It has been a Congressional determination since the Judiciary Act of 1789 that, as a general rule, appellate review should be postponed until after final judgment. *Kerr v. United States District Court*,

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[1] Respondent also faults petitioner for failing to renew his motion to disqualify after his plea and before sentencing. Br. in Opp. 4, 10. Petitioner filed two motions for recusal prior to his plea, Pet. App. 17a-31a, and was not required to renew those motions – which would have been futile – after his plea. In any event, because the government failed to raise this point below, it has been waived and may not be relied upon in this Court. *Davis v. United States*, 495 U.S. 472, 488-89 (1990).

426 U.S. 394, 402-03 (1976). For the writ to issue, "petitioners must show that they lack adequate alternative means to obtain the relief they seek, . . . and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (citations omitted). "Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. at 403. Finally, mandamus is disfavored because, as this Court has recognized, its use "indisputably contributes to piecemeal appellate litigation." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). This Court has stated that the policy against piecemeal litigation is particularly acute in criminal cases. *Will v. United States*, 389 U.S. at 96 (vacating writ granted in favor of government in criminal case). Indeed, in *Will*, in the context of a government appeal, this Court stated that it had never approved of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. *Id.* at 98.

Recognizing that mandamus is an extraordinary remedy, especially in the criminal context, the courts of appeals have held that "[t]he question of disqualification is reviewable on a petition for writ of mandamus, but a writ will not lie in the absence of exceptional circumstances." *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *accord In re School Asbestos Litigation*, 977 F.2d 764, 778 n.14 (3d Cir. 1992); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1028 (D.C Cir. 1976). The courts of appeals require a much greater showing for issuance of the writ prior to final judgment (a "clear and indisputable right" to the writ) than they require for reversal upon post-judgment review of the recusal decision (normally abuse of discretion). *See Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (recognizing differing standards of review).

These authorities make clear that mandamus is not intended to be an ordinary remedy in cases where a district court judge improperly refuses to recuse him/herself. While there are exceptional cases where appellate courts have

reviewed a pre-trial order denying a recusal motion, *Nichols v. Alley*, 71 F.3d at 352 (granting writ in case involving Oklahoma City bombing), mandamus has been denied in what would be perceived as other exceptional cases based upon this Court's drastic limitation on use of the writ. *See United States v. Moussaoui*, 333 F.3d 509, 516-17 (4th Cir. 2003) (denying writ in case involving order to produce enemy combatant witness for deposition). Respondent's contention – that mandamus is an adequate alternative remedy – is simply in error. Thus, if mandamus is to be the only available remedy, it should be by way of a clear pronouncement by this Court.

Moreover, respondent's argument merely highlights subsidiary circuit conflicts over the question of whether the failure to seek an immediate writ of mandamus waives the right to challenge a denial of recusal on appeal. Respondent points out that in the Seventh Circuit, "a failure to seek a writ of mandamus following the district court's denial of a recusal motion waives the argument on appeal." Br. in Opp. 7-8 (*citing United States v. Horton*, 98 F.3d 313, 316-17 (7th Cir. 1996) and *United States v. Balistrieri*, 779 F.2d 1191, 1205 (1985), *cert. denied*, 475 U.S. 1095 (1986)). Respondent fails to mention, however, that the Seventh Circuit is the *only* circuit holding that mandamus is the sole remedy for the denial of a recusal motion. In every other circuit, including the Eleventh Circuit, such a denial is reviewable on appeal following final judgment. *See, e.g., United States v. Morrison*, 153 F.3d 34, 47-49 (2d Cir. 1998); *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 384-85 & n.5 (11th Cir. 1991); *United States v. Barry*, 938 F.2d 1327, 1339-42 (D.C. Cir. 1991).

A second subsidiary circuit conflict arises out of the Third Circuit's opinion in *In re School Asbestos Litigation*, cited by respondent. There, the court of appeals held that the writ of mandamus will not lie to review an order denying recusal pursuant to 28 U.S.C. § 144 where a personal bias or prejudice is shown. 977 F.2d at 774-76; *see also SCA Services v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (same). No valid reason exists to preclude mandamus review in actual bias cases yet require it where only the appearance of partiality is alleged.

As demonstrated by petitioner, and conceded by respondent, the circuits are sharply divided on the preclusive effect of an unconditional guilty plea on the ability to challenge on appeal the denial of a recusal motion. Respondent's assumption that because mandamus is allegedly an "adequate remedy," it is *the* exclusive remedy, is a position supported by the case law of only one circuit. Moreover, as shown above, the extraordinary writ of mandamus cannot be considered an "adequate remedy" to contest recusal in a criminal case.

4. Respondent also faults petitioner for failing to preserve the recusal issue by seeking to enter into a conditional guilty plea under Fed. R. Crim. P. 11(a)(2). Use of that Rule requires the approval of the district court and the consent of the government. Opp. Br. at 9. Respondent claims that "there is no concrete reason to believe that a judge would routinely or willfully reject a conditional plea agreement seeking to preserve the appearance issue for appeal." *Id.* The First Circuit specifically rejected this illogical argument in *United States v. Chantal*, stating:

> Congress established by the detailed provisions of § 455(a) an entirely new concept of acceptable judicial disqualification. It would be incongruous to hold that for one seeking the benefit of such protection the consent would have to be obtained from the very judge whose qualifications are under attack.

902 F.2d at 1021.

Respondent also argues that the petitioner "has no basis for suggesting . . . that a conditional plea would necessarily have been rejected by the court and the government." Opp. Br. at 9. To the contrary, the record clearly demonstrates that the government objected to virtually every defense application and motion made below. The district court also denied petitioner's recusal motions on every occasion. Pet. App. 17a-31a. During oral argument before the court of appeals, the lead prosecutor flatly stated that he would not have consented to a conditional plea.

Moreover, respondent's argument places a defendant in a position where the issue may never be preserved. If petitioner had sought to enter a conditional plea, and had

his request been denied by either the government or the district court (as was highly likely), respondent would now have contended that an explicit waiver of the right to raise the recusal issue would have occurred. But the failure to seek a conditional plea, according to respondent, also results in a waiver. Under respondent's view, the defendant is left only with the option of proceeding to trial and foregoing the benefit of a sentencing adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. Such a strange outcome clearly conflicts with this Court's recognition that "[t]he very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 865.[2]

5. Finally, respondent argues that review by this Court is not warranted "because the sentencing demonstrates that there is no basis for a belief that the judge was partial during sentencing." Opp. Br. at 10. Respondent's argument fundamentally misconstrues the applicable standard under § 455(a). To determine whether recusal is required, courts must assess "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality," *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), and not whether the proceedings had an appearance of fairness *in hindsight*.

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[2] Respondent also argues that the court of appeals was correct in its interpretation of the recusal statute's waiver provision, 28 U.S.C. § 455(e). Br. in Opp. 10 n.1. The court of appeals held that a recusal motion presented a "full disclosure on the record of the basis for disqualification." Pet. App. 7a n.6 (*quoting* 28 U.S.C. § 455(e)). That holding is not central to the grant of the petition and, in any event, the court of appeals erred in holding that the filing of a motion for recusal could constitute the full disclosure required by the statute. The statute was drafted so as to permit waiver by the parties after a full disclosure by the court not waiver by way of a denied motion to recuse. *See Code of Conduct for United States Judges*, "Notice Concerning Waiver of Judicial Disqualification."

Petitioner argued below for an adjustment based upon acceptance of responsibility and a downward departure on a number of grounds, including substantial assistance to law enforcement authorities (Pet. App. 43a-44a), all of which were denied by the district court. *Id.* The district court also imposed adjustments for multiple acts of obstruction of justice, sophisticated concealment, and role in the offense. *Id.* at 35a-42a. On this record, there is no reasonable basis to conclude, in hindsight, that petitioner received a fair sentence from a neutral and detached jurist.

B. The Eleventh Circuit's Ruling Upholding Petitioner's Sentence Based Upon Multiple Acts of Obstruction of Justice Ignored This Court's Decision in *Williams v. United States*

Respondent claims that this Court's decision in *Williams v. United States*, 503 U.S. 193 (1992), is inapposite here because the rule announced in that decision "applies to departures or other decisions affecting the applicable Guidelines' sentencing range." Br. in Opp. 11. While acknowledging *Williams* applies to "other decisions," respondent then argues that *Williams* is limited to guideline departures. As pointed out in the petition for writ of certiorari, the rationale of *Williams* has not been so limited; rather, it has been held by the courts of appeals to be equally applicable to adjustments affecting the Guidelines calculation. *See, e.g., United States v. Kendrick*, 22 F.3d 1066, 1068-70 (11th Cir. 1994).

Respondent further errs in contending that "there was no error affecting the determination of petitioner's sentencing range" because "[r]egardless of whether petitioner's media campaign constituted obstruction under Section 3C1.1, application of the Guideline was required on the basis of either of the grounds approved by the court of appeals." Br. in Opp. 13. The district court's finding of multiple acts of obstruction of justice was the linchpin of the district court's entire sentencing determination and all of its sentencing findings. Pet. App. 36a-45a. Without a finding on *each* of the "multiple obstructive acts," *id.* at 44a, the district court may well have reduced petitioner's sentence.

In similar circumstances, appellate courts in other circuits, have remanded for resentencing. For example, in *United States v. Vargas*, 230 F.3d 328 (7th Cir. 2000), the defendant contended that the district court refused to depart based upon the assessment of an invalid criminal history point. The Seventh Circuit remanded, holding that the error may have affected the district court's refusal to depart. *Id.* at 331. Here, similarly, the error resulted in the district court's refusal to grant an adjustment for acceptance of responsibility, to depart downward, or to sentence petitioner at the low end of the Guidelines range. The sentence imposed was, therefore, based upon an erroneous application of the Guidelines, 18 U.S.C. § 3742(f)(1), and remand was required.

Finally, respondent now claims that the same sentence would have been imposed after failing to advance that argument in the appellate court. Again, respondent has waived its right to do so. *Davis v. United States*, 495 U.S. at 488-89. Even if this argument has not been waived, the district court provided no indication that the same sentence would have been imposed absent the third obstructive act, and it is disingenuous for respondent to suggest that "it is reasonable to conclude that the district court would have imposed the same sentence." Br. in Opp. 14. This Court's decision in *Williams* compels that the court of appeals reach *all* issues underlying the obstruction enhancement which the district court determined were critical to all its sentencing decisions. This Court should grant certiorari and mandate a resentencing on all portions of the sentence affected by the court of appeals' failure to reach all of the obstruction of justice findings.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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